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Shri @ Indran Ram a/l Ramasamy v Wong Yew Kee

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HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO BA-12BNCVC-87–11 OF 2019
ALICE LOKE JC
1 FEBRUARY 2021

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Civil Procedure — Appeal — Appeal against decision of sessions court — Plaintiff alledged defendant was liable for fraud and fraudulent misrepresentation in representing to plaintiff on lawful proprietor of lands — Plaintiff alledged defendant concealed material fact that there was dispute as to ownership of lands — Whether civil suit was in fact attempt by plaintiff to enforce judgment obtained by lifting the corporate veil and making first defendant liable — Whether sessions court judge was wrong to decide that corporate veil ought to be pierced when pleading of plaintiff made no mention of it — Whether res judicata operated to estop plaintiff from relitigating suit against first defendant after summary judgment on merits was entered against company

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The defendant appealed against the decision of the learned sessions court judge which, after a full trial, allowed the claim of the plaintiff. The defendant was thereupon ordered to pay the plaintiff RM200,000 as refund of the deposit paid towards an aborted land deal. In addition, general damages of RM30,000 was also ordered against the appellant, together with interest at 5% on the full judgment sum awarded and costs of RM20,000. The plaintiff was a real property investor. Sometime between May and June 2014, the plaintiff's agent introduced him to the first defendant. The meeting was at the office of the first defendant, who held himself out to be Dato' Seri Shri Ram. He also said he was representing a company known as Berkshire Hatherley Capital Sdn Bhd ('Berkshire'). The first defendant was the director and also the majority shareholder of Berkshire. At the meeting, the first defendant showed the plaintiff photocopies of titles with Berkshire as the registered owner of two pieces of land held under title known as Lot 2059 GRN 46344 and Lot 2066 GRN 46351, Mukim Semenyih, Daerah Ulu Langat, Negeri Selangor ('the said lands') which it was keen to sell. Upon hearing this, the plaintiff was keen to purchase the said lands. Both parties orally agreed that said lands were to be transacted for RM10m. In August 2014, the plaintiff paid a sum of RM200,000 as earnest deposit to the second defendant who acted as solicitors for Berkshire. This sum was paid in two cheques on 15 August 2014 and 22 August 2014. The sum was held by the second defendant as stakeholders pending the execution of the sale and purchase agreement. The plaintiff then appointed its solicitors, Tetuan Ng, Ti & Associates to attend to the formal execution of the agreement. On 24 September 2014, the plaintiff conducted a

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search on the said lands. He was surprised to find that the said lands were registered in Nafilco Sdn Bhd ('Nafilco') instead of Berkshire. The plaintiff's solicitors wrote to the second defendant seeking clarification on the matter. They did not get any response. Instead, the first defendant responded, three months later. The explanation he proffered was that the lands had in fact been purchased by Berkshire from Nafilco. He further gave the assurance that the registration process to Berkshire was being attended to. However, by middle of 2015, the plaintiff, through his solicitors, informed the first defendant that he no longer wished to proceed with the purchase of the said lands and requested for a refund the RM200,000 paid. His request was ignored. The plaintiff thereupon filed the present suit claiming that the first defendant was liable for fraud and fraudulent misrepresentation in representing to the plaintiff that Berkshire was the lawful proprietor of the said lands at the material time when it was not. As a consequence of such misrepresentation, the first defendant had wrongly induced the plaintiff to agree to buy the said lands from Berkshire, causing him to pay the earnest deposit to the second defendant. The plaintiff further claimed that the first defendant had concealed a material fact that there was a dispute as to the ownership of the said lands. Following the discovery that Nafilco was the rightful owner, the plaintiff commenced proceedings against Berkshire, the first defendant and the second defendant vide Shah Alam Sessions Court Civil Suit No BA-B52NCVC-157–05 of 2016 ('Suit 157'). The plaintiff obtained summary judgment in Suit 157 against Berkshire on 22 August 2016, for the sum of RM200,000. In the court below, the first defendant raised res judicata to defeat the present suit. Having successfully obtained summary judgment against Berkshire, the plaintiff ought not to be allowed to relitigate the suit against the first defendant by filing a new suit. The first defendant further contended that at the material time of the plaintiff agreeing to buy the said lands, it was registered in Berkshire's name. The issue of misrepresentation therefore did not arise. He was not aware of the suit commenced by Nafilco. The RM200,000 paid by the plaintiff could not have been the result of any misrepresentation on his part. The first defendant argued two main grounds in this appeal. Firstly, it contended that this suit was in fact an attempt by the plaintiff to enforce the judgment obtained against Berkshire in Suit 157 by lifting the corporate veil and making the first defendant liable. The sessions court judge was wrong to decide that the corporate veil ought to be pierced when the pleading of the plaintiff made no mention of it. Secondly, res judicata operated to estop the plaintiff from relitigating the suit against the first defendant after summary judgment on merits was entered against the company in Suit 157.

Held, allowing the appeal in part: (a) dismissing the appeal on liability by the first defendant; (b) setting aside the RM30,000 award for damages; and (c) the first defendant to pay the plaintiff RM5,000 in costs:

(1) The court found that the sessions court had correctly evaluated the evidence in finding that the 'documentary evidence and chronology of events clearly showed that the first defendant was at the material time aware of the legal ownership of the lands but had intentionally misled the plaintiff to purchase the lands and pay the earnest deposit', as this conclusion was borne out by the evidence adduced. The learned sessions court judge also found that the first defendant was not a credible witness. Having had the benefit of audio-visual evaluation of witnesses, the court would be hesitant to differ from him as an appellate court did not have the advantage a trial judge had. Therefore, the court, found the learned sessions court's findings and conclusion of fraud and fraudulent misrepresentation was justified from the evidence adduced (see paras 46–48).

(2) The res judicata point raised was wholly misconceived and without merits. The principle would only apply if Suit 157 had determined the liability of the first defendant, but it did not, as the suit against him was withdrawn. Therefore, where the first defendant was concerned, there was no previous litigation to speak of (see paras 50 & 52).

(3) The court agreed with submission for the defence that it was not the pleaded case for the plaintiff. The statement of claim was bereft of any pleading on lifting of the corporate veil. That being the case, the sessions court judge ought not to have decided on this issue as it was contrary to the rule of pleadings, which purpose was to give notice to the opposing party as to the case it had to meet. The pleaded cause of action against the first defendant was fraud and fraudulent misrepresentation. There was sufficient evidence to establish such a claim against him. There was no necessity to pierce the corporate veil to pin Berkshire's liability in Suit 157 on the first defendant. Taking into account the totality of the evidence adduced, and the conclusion arrived at by the trial judge that fraud and fraudulent misrepresentation was established, the court found no appealable error to warrant appellate interference on the issue of liability (see paras 54–55 & 57).

(4) The plaintiff had clearly suffered a loss of RM200,000. He was entitled to be compensation for this loss. The sessions court was right to order this amount to be paid to the plaintiff as damages. In addition to the amount of RM200,000 the sessions court also awarded RM30,000 as damages. Although an award of damages was pleaded, there must have been evidence to justify an award of general damages. In the absence of evidence to substantiate any other sum to be awarded apart from RM200,000, the award of RM30,000 was incorrect and thereby set aside (see paras 60–61).

[Bahasa Malaysia summary

Defendan telah merayu terhadap keputusan hakim mahkamah sesyen yang bijaksana yang mana, setelah perbicaraan penuh, membenarkan tuntutan plaintif. Defendan dengan itu diperintahkan untuk membayar plaintif RM200,000 sebagai pembayaran semula deposit yang telah dibayar bagi perjanjian tanah yang telah dibatalkan. Selain itu, ganti rugi am RM30,000 juga diperintahkan terhadap perayu, dengan faedah 5% pada jumlah penuh penghakiman yang diberikan dan kos sebanyak RM20,000. Plaintif adalah pelabur hartanah. Suatu ketika antara Mei dan Jun 2014, ejen plaintif memperkenalkannya kepada defendan pertama. Mesyuarat tersebut diadakan di pejabat defendan pertama, yang memperkenalkan dirinya sebagai Dato' Seri Shri Ram. Beliau juga mengatakan beliau mewakili sebuah syarikat yang dikenali sebagai Berkshire Hatherley Capital Sdn Bhd ('Berkshire'). Defendan pertama adalah pengarah dan juga pemegang saham majoriti Berkshire. Semasa mesyuarat tersebut, defendan pertama menunjukkan salinan fotokopi hak milik plaintif dengan Berkshire sebagai pemilik berdaftar dua bahagian tanah yang diberi hak milik dikenali sebagai Lot 2059 GRN 46344 dan Lot 2066 GRN 46351, Mukim Semenyih, Daerah Ulu Langat, Negeri Selangor ('tanah tersebut') yang mana ia berminat untuk dijual. Setelah mendengar, plaintif berminat untuk membeli tanah tersebut. Kedua-dua pihak secara lisan bersetuju bahawa tanah tersebut akan dipindah milik dengan harga RM10 juta. Pada bulan Ogos 2014, plaintif membayar sejumlah RM200,000 sebagai wang pendahuluan kepada defendan kedua yang bertindak sebagai peguamcara untuk Berkshire. Jumlah ini dibayar secara dua cek pada 15 Ogos 2014 dan 22 Ogos 2014. Jumlah tersebut dipegang oleh defendan kedua sebagai pemegang kepentingan sementara menunggu penandatangan perjanjian jual beli. Plaintif kemudian melantik peguamnya, Tetuan Ng, Ti & Associates untuk menghadiri penandatangan perjanjian tersebut secara rasmi. Pada 24 September 2014, plaintif membuat carian pada tanah tersebut. Beliau terkejut apabila mendapati tanah tersebut didaftarkan atas Nafilco Sdn Bhd ('Nafilco') dan bukannya Berkshire. Peguamcara plaintif menulis kepada defendan kedua untuk memohon penjelasan mengenai perkara tersebut. Mereka tidak mendapat jawapan. Sebaliknya, defendan pertama menjawab, tiga bulan kemudian. Penjelasan yang beliau berikan adalah bahawa tanah tersebut sebenarnya telah dibeli oleh Berkshire dari Nafilco. Beliau selanjutnya memberi jaminan bahawa proses pendaftaran kepada Berkshire sedang dilaksanakan. Namun, pada pertengahan tahun 2015, Plaintif, melalui peguamnya, telah memaklumkan defendan pertama bahawa beliau tidak lagi ingin melakukan pembelian tanah tersebut dan meminta pengembalian wang sebanyak RM200,000 yang telah dibayar. Permintaannya tidak diendahkan. Plaintif kemudiannya memfailkan saman semasa dengan mendakwa bahawa defendan pertama bertanggungjawab atas penipuan dan salah nyata dalam memberikan representasi kepada pihak plaintif bahawa Berkshire adalah pemilik sah tanah-tanah tersebut pada masa yang material tetapi sebenarnya

tidak. Akibat dari salah nyata tersebut, defendan pertama telah secara salah mendorong plaintif supaya bersetuju untuk membeli tanah tersebut dari Berkshire, menyebabkan beliau membayar wang pendahuluan kepada defendan kedua. Plaintif selanjutnya mendakwa bahawa defendan pertama telah menyembunyikan fakta material bahawa terdapat pertikaian mengenai hak milik tanah tersebut. Berikutan dapatan bahawa Nafilco adalah pemilik yang sah, plaintif memulakan prosiding terhadap Berkshire, defendan pertama dan defendan kedua melalui saman sivil Mahkamah Sesyen Shah Alam No BA-B52NCVC-157–05 Tahun 2016 ('Guaman 157'). Plaintif memperoleh penghakiman terus dalam Guaman 157 terhadap Berkshire pada 22 Ogos 2016, dengan jumlah RM200,000. Di mahkamah di bawah, defendan pertama membangkitkan res judicata untuk membatalkan saman semasa. Setelah berjaya mendapat penghakiman terus terhadap Berkshire, plaintif tidak seharusnya dibenarkan untuk membicarakan semula saman tersebut terhadap defendan pertama dengan memfailkan tuntutan baru. Defendan pertama kemudian berpendapat bahawa pada masa material plaintif bersetuju untuk membeli tanah tersebut, ia didaftarkan atas nama Berkshire. Oleh itu, isu salah nyata tidak timbul. Beliau tidak menyedari saman yang dikemukakan oleh Nafilco. Jumlah RM200,000 yang dibayar oleh plaintif tidak mungkin disebabkan oleh salah nyata dari pihaknya. Defendan pertama menghujahkan dua alasan utama dalam rayuan ini. Pertama, ia berpendapat bahawa saman ini sebenarnya merupakan percubaan oleh plaintif untuk menguatkuasakan penghakiman yang diperolehi terhadap Berkshire dalam Guaman 157 dengan mengangkat tirai pemerbadanan dan menyebabkan defendan pertama bertanggungjawab. Hakim mahkamah sesyen telah terkhilaf apabila memutuskan bahawa tirai pemerbadanan harus diangkat apabila pliding oleh plaintif tidak menyatakannya. Kedua, res judicata beroperasi untuk menghentikan plaintif daripada membicarakan semula tuntutan saman terhadap defendan pertama setelah penghakiman terus berdasarakan merit dikeluarkan terhadap syarikat tersebut dalam Guaman 157.

Diputuskan, membenarkan sebahagian rayuan: (a) menolak rayuan atas tanggungjawab oleh defendan pertama; (b) mengetepikan ganti rugi RM30,000; dan (c) defendan pertama harus membayar kos kepada plaintif sebanyak RM5,000:

(1) Mahkamah mendapati bahawa mahkamah sesyen telah menilai keterangan dengan tepat dalam mendapati bahawa 'bukti dokumentari dan kronologi peristiwa dengan jelas menunjukkan bahawa defendan pertama pada masa material mengetahui hak milik atas tanah tersebut tetapi dengan sengaja membuat salah nyata terhadap plaintif untuk membeli tanah tersebut dan membayar wang pendahuluan', kerana kesimpulan ini disokong oleh keterangan yang dikemukakan. Hakim mahkamah sesyen yang bijaksana juga mendapati bahawa defendan pertama bukan saksi yang boleh dipercayai. Setelah membuat penilaian

audio-visual saksi, mahkamah mempunyai keraguan untuk membezakannya kerana mahkamah rayuan tidak memiliki kelebihan yang dimiliki hakim perbicaraan. Oleh itu, mahkamah, mendapati dapatan mahkamah sesyen yang bijaksana dan kesimpulan penipuan dan salah nyata telah dibuktikan dari keterangan yang dikemukakan (lihat perenggan 46–48).

(2) Isu res judicata yang dibangkitkan sepenuhnya adalah salah faham dan tanpa merit. Prinsip tersebut hanya akan terpakai sekiranya Guaman 157 telah menentukan tanggungjawab defendan pertama, tetapi ianya tidak, kerana saman terhadapnya ditarik balik. Oleh itu, mengenai defendan pertama, tidak ada perbicaraan sebelumnya untuk dibicarakan (lihat perenggan 50 & 52).

(3) Mahkamah bersetuju dengan hujahan pembelaan bahawa ianya bukan kes yang diplidkan bagi plaintif. Penyataan tuntutan tersebut tidak ada sebarang plid untuk mengangkat tirai pemerbadanan. Justeru, hakim mahkamah sesyen tidak seharusnya memutuskan isu ini kerana ianya bertentangan dengan aturan pliding, yang bertujuan memberikan pemberitahuan kepada pihak lawan mengenai kes yang harus dibuktikannya. Kausa tindakan yang diplidkan terhadap defendan pertama adalah penipuan dan salah nyata. Terdapat keterangan yang mencukupi untuk membuktikan tuntutan tersebut terhadapnya. Tidak ada keperluan untuk menembusi tirai pemerbadanan untuk menetapkan tanggungjawab Berkshire dalam Guaman 157 terhadap defendan pertama. Dengan mengambil kira keseluruhan keterangan yang dikemukakan, dan kesimpulan yang dicapai oleh hakim perbicaraan bahawa penipuan dan salah nyata telah dibuktikan, mahkamah tidak menemukan kesalahan yang dapat dirayu untuk menjamin campur tangan mahkamah rayuan dalam isu liabiliti (lihat perenggan 54–55 & 57).

(4) Plaintif jelas mengalami kerugian sebanyak RM200,000. Beliau berhak mendapat pampasan atas kerugian ini. Mahkamah sesyen telah dengan tepat memerintahkan jumlah ini dibayar kepada plaintif sebagai ganti rugi. Selain wang berjumlah RM200,000, mahkamah sesyen juga memberikan ganti rugi sebanyak RM30,000. Walaupun award ganti rugi diplidkan, seharusnya terdapat keterangan untuk membenarkan pemberian ganti rugi am. Sekiranya tidak ada keterangan untuk membuktikan jumlah wang lain yang akan diberikan selain daripada RM200,000, pemberian RM30,000 adalah tidak betul dan dengan itu diketepikan (lihat perenggan 60–61).]

Cases referred to

ALW Car Workshop Sdn Bhd v AXA Affin General Insurance Bhd [2019] 4 MLJ 561, FC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)
Kee Wah Soong v Yap Boon Hwa and another case [2018] MLJU 1289, CA (refd)
Master Jaya Environmental Sdn Bhd v Pentas Flora Sdn Bhd [2020] 2 MLJ 117, CA (refd)
Md Hilmi bin Md Noor & Anor v Azman bin Ahmad & Ors [2016] MLJU 591; [2016] 7 CLJ 360, CA (refd)
N Ganesan N Narayan v Waytha Moorthy a/l Ponnusamy [2020] 1 LNS 29, CA (refd)
S Quarry Sdn Bhd v Desaru Development Corp Sdn Bhd & Ors [2019] MLJU 99, CA (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (refd)
Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd [2010] 3 MLJ 425, CA (refd)

Legislation referred to

Companies Act 1965
Contracts Act 1950 ss 17, 18

Kaitlyn KL Tiew (John Yong & Irene Song) for the plaintiff.
G Thangadurai (Govin T Durai & Co) for the defendant.

Alice Loke JC:

INTRODUCTION

[1] The appellant appeals against the decision of the learned sessions court judge which, after a full trial, allowed the claim of the respondent. The appellant was thereupon ordered to pay the respondent RM200,000 as refund of the deposit paid towards an aborted land deal. In addition, general damages of RM30,000 was also ordered against the appellant, together with interest at 5% on the full judgment sum awarded and costs of RM20,000.

[2] The appellant and respondent were the first defendant and plaintiff respectively in the court below. For ease of reference the parties will be referred to as they were in the sessions court. The salient facts of the respective parties' case are as set out below.

THE PLAINTIFF'S CASE

[3] The plaintiff was a real property investor. Sometime between May and June 2014, the plaintiff's agent introduced him to the first defendant. The meeting was at the office of first defendant, who held himself out to be Dato' Seri Shri Ram. He also said he was representing a company known as Berkshire Hatherley Capital Sdn Bhd ('Berkshire').

A **[4]** Berkshire was a company incorporated under the Companies Act 1965 with a registered address at No 89–1, Jalan 1/91, Taman Shamelin Perkasa, Kuala Lumpur. The first defendant was the director and also the majority shareholder of Berkshire.

B **[5]** At the meeting, the first defendant showed the plaintiff photocopies of titles with Berkshire as the registered owner of two pieces of land held under title known as Lot 2059 GRN 46344 and Lot 2066 GRN 46351, Mukim Semenyih, Daerah Ulu Langat, Negeri Selangor ('the said lands') which it was keen to sell. Upon hearing this, the plaintiff was keen to purchase the said C lands. Both parties orally agreed that said lands were to be transacted for RM10m.

[6] In August 2014, the plaintiff paid a sum of RM200,000 as earnest D deposit to the second defendant who acted as solicitors for Berkshire. This sum was paid in two cheques on 15 August 2014 and 22 August 2014. The sum was held by the second defendant as stakeholders pending the execution of the sale and purchase agreement.

E **[7]** The plaintiff then appointed its solicitors, Tetuan Ng, Ti & Associates to attend to the formal execution of the agreement. It was proposed for the balance purchase price to be paid within six months from the date of execution of the sale and purchase agreement, subject to an extension of one month and payment of late payment charges at 8%pa.

F **[8]** On 24 September 2014, the plaintiff conducted a search on the said lands. He was surprised to find that the said lands were registered in Nafilco Sdn Bhd ('Nafilco') instead of Berkshire. The plaintiff's solicitors wrote to the second defendant seeking clarification on the matter. They did not get any G response. Instead, it was the first defendant who responded, but some three months later. The explanation he proffered was that the lands had in fact been purchased by Berkshire from Nafilco. He further gave the assurance that the registration process to Berkshire was being attended to.

H **[9]** The plaintiff waited a few months for the matter to be resolved. However by middle of 2015, the plaintiff, through his solicitors, informed the first defendant that he no longer wished to proceed with the purchase of the said lands and requested for a refund the RM200,000 paid. His request was ignored.

I **[10]** The plaintiff thereupon filed the present suit claiming that the first defendant was liable in fraud and fraudulent misrepresentation in representing to the plaintiff that Berkshire was the lawful proprietor of the said lands at the material time when it was not. As a consequence of such misrepresentation, the

first defendant had wrongly induced the plaintiff to agree to buy the said lands from Berkshire, causing him to pay the earnest deposit to the second defendant.

[11] The plaintiff further claimed that the first defendant had concealed a material fact that there was a dispute as to the ownership of the said lands.

[12] The dispute pertained to Nafilco's claim on the said lands. On 24 March 2014, vide Shah Alam High Court Civil Suit No 23NCVC-3– 03 of 2014, Nafilco commenced a suit against Berkshire and the first defendant together with five others claiming that Berkshire had wrongly caused the lands to be transferred to itself. Nafilco sought to declare the registration of the said lands in Berkshire's name be null and void. On 7 July 2014, Nafilco obtained a judgment in default against Berkshire and the first defendant, which resulted in the retransfer of the said lands to Nafilco. This explained the search results on 24 September 2014 conducted by the plaintiff which showed Nafilco as the registered owner.

[13] Following the discovery that Nafilco was the rightful owner, the plaintiff commenced proceedings against Berkshire, the first defendant and the second defendant vide Shah Alam Sessions Court Civil Suit No BA-B52NCVC-157–05 of 2016 ('Suit 157').

[14] The plaintiff obtained summary judgment in Suit 157 against Berkshire on 22 August 2016, for the sum of RM200,000. To date, the plaintiff had not been successful in recovering this sum from Berkshire. The plaintiff did not proceed against the first and second defendant, as the suit was withdrawn prior to the trial date. Suit 157 was ordered to be struck out with liberty to file afresh. The plaintiff then filed the instant suit.

THE DEFENDANT'S CASE

[15] In the court below, the first defendant raised res judicata to defeat the present suit. Having successfully obtained summary judgment against Berkshire, the plaintiff ought not to be allowed to relitigate the suit against the first defendant by filing a new suit.

[16] The first defendant further contended that at the material time of the plaintiff agreeing to buy the said lands, it was registered in Berkshire's name. The issue of misrepresentation therefore did not arise. He was not aware of the suit commenced by Nafilco. The RM200,000 paid by the plaintiff could not have been the result of any misrepresentation on his part. Added to that, the deposit of RM200,000 was never paid to the first defendant, but to the second defendant as the stakeholder.

DECISION OF THE SESSIONS COURT

[17] In allowing the plaintiff's claim, the sessions court judge made several important findings of fact in relation to fraudulent misrepresentation on the part of the first defendant. In summary, these findings were:

(a) the lands were fraudulently transferred from Nafilco to Berkshire sometime in November 2013, two months after Berkshire was established as a company;

(b) in March 2014, there was already a letter of demand sent by Nafilco Sdn Bhd to the first defendant's solicitors to dispute Berkshire's ownership of the said lands. Therefore in August 2014, when the plaintiff paid the earnest deposit in August 2014, the first defendant was aware of the contested ownership but did not disclose it to the plaintiff who was induced to pay the earnest deposit of RM200,000;

(c) the first defendant was not a credible witness and his testimony was questionable. The honorific title of 'Dato Seri' on his name card was not proven to be conferred on him. He was also an advocate and solicitor who had been struck off the Rolls;

(d) there was ample documentary evidence before the court to confirm the fraudulent misrepresentation of the first defendant; and

(e) although the parties to the intended agreement to sell and purchase the said lands were the plaintiff and Berkshire, the corporate veil ought to be lifted to make the first defendant liable as the shareholder/director of Berkshire.

[18] These findings persuaded the learned sessions judge to conclude that on a balance of probabilities, the first defendant was liable in fraud and fraudulent misrepresentation. Consequently, the first defendant had to return the sum of RM200,000. In addition, the fact that the first defendant did not receive the money was irrelevant as the loss of the earnest deposit was occasioned by the first defendant's misrepresentation.

[19] The sessions court also ruled that the principle of res judicata to be inapplicable to preclude the plaintiff's claim against the first defendant as the summary judgment was against Berkshire and not the first defendant.

LAW ON APPELLATE INTERVENTION

[20] I am mindful that this is an appeal after a full trial and that an appellate court will generally be hesitant to disturb the findings of the trial judge unless there are clearly appealable errors.

[21] An appellate court will not, generally speaking, intervene and interfere unless the trial court is shown to be plainly wrong in arriving at its conclusion. Matters of finding of facts and legitimate exercise of discretion by the courts of original jurisdiction are often not interfered with by the appellate courts (see *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2010] 3 MLJ 425; *Master Jaya Environmental Sdn Bhd v Pentas Flora Sdn Bhd* [2020] 2 MLJ 117).

[22] However, appellate interference is warranted where the trial judge has made a decision which is plainly wrong. A decision is plainly wrong if it is one which no reasonable judge could have reached.

[23] The Federal Court in *S Quarry Sdn Bhd v Desaru Development Corp Sdn Bhd & Ors* [2019] MLJU 99 laid down several instances when decisions are considered to be plainly wrong or perverse. Some of the instances where the trial judge's decision is perverse, are where he had:

(a) misdirected itself on the evidence;

(b) failed to judicially appreciate the evidence;

(c) failed to consider any material evidence;

(d) acted on some irrelevant evidence as to render the decision wholly erroneous;

(e) made wrong inference from facts;

(f) misapprehended the facts; and

(g) gave reasons which are wholly unsatisfactory or contradictory of each other.

(See also *N Ganesan N Narayan v Waytha Moorthy a/l Ponnusamy* [2020] 1 LNS 29; *Md Hilmi bin Md Noor & Anor v Azman bin Ahmad & Ors* [2016] MLJU 591; [2016] 7 CLJ 360.)

ISSUES IN THIS APPEAL

[24] The first defendant argues two main grounds in this appeal. Firstly, it contends that this suit is in fact an attempt by the plaintiff to enforce the judgment obtained against Berkshire in Suit 157 by lifting the corporate veil and making the first defendant liable. The sessions court judge was wrong to decide that the corporate veil ought to be pierced when the pleading of the plaintiff made no mention of it. Secondly, res judicata operates to estop the plaintiff from relitigating the suit against the first defendant after summary judgment on merits was entered against the company in Suit 157.

A DECISION OF THIS COURT

Fraud and fraudulent misrepresentation

B **[25]** Notwithstanding the fact that the grounds raised in this appeal are narrow, an appellate court is entitled to examine the entire evidence forming the basis of the trial judge's finding of liability. As the plaintiff's case was premised on fraud and/or fraudulent misrepresentation, the existence of which is to be considered at the time the plaintiff was induced to purchase the lands and subsequently paid the earnest deposit.

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[26] Fraud and misrepresentation have been statutorily defined in ss 17 and 18 of the Contracts Act 1950. Fraudulent misrepresentation which is a species of both fraud and misrepresentation, was explained by the Federal Court in D *ALW Car Workshop Sdn Bhd v AXA Affin General Insurance Bhd* [2019] 4 MLJ 561 as follows,

> [45] On this point, we agree with the Court of Appeal in its findings, as stated in para 33 of its judgment, that:
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> E Whether any particular claim is tainted with fraudulent intent is a question of fact to be inferred from the surrounding circumstances. Making a false statement in the belief that it is true constitutes misrepresentation. However, making a false statement with the knowledge that it is false or not believing it to be true and the intention to deceive amounts to fraudulent misrepresentation. The test of fraudulent misrepresentation as enunciated by the Privy Council in *Baron Akerheilm v Rolf De Marc* [1959] AC 789 PC is as follows:
>
> F > The question was not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense which he understood it albeit erroneously, when it was made.

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[27] The question as to whether an act constitutes fraud and fraudulent misrepresentation is a question of fact, to be deduced from the circumstances of H the case.

[28] The fraudulent conduct relied on here is the representation that Berkshire is the legal registered owner, and concealing the fact that the ownership at the material time was disputed by Nafilco.

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[29] Nafilco was then a company in liquidation. A private liquidator had been appointed. On 5 March 2014, the liquidator made a police report to state that he believed the said lands had been fraudulently transferred to Berkshire in 2013. The relevant portion of the police report reads,

11. Setelah carian-carian dilakukan ke atas Tanah-tanah tersebut dengan Pejabat Tanah dan Galian Selangor, saya mendapati Tanah-tanah tersebut telah pun dipindah milik secara fraud dan menyalahi undang-undang daripada Syarikat tersebut (*Nafilco*) kepada BHCSB (*Berkshire*) pada 20 Disember 2013 dan 13 Februari 2013 tanpa pengetahuan dan persetujuan Pegawai Penerima Malaysia dan/atu saya dan juga kebenaran Mahkamah Tinggi Kuala Lumpur ...

[30] The police report also mentioned the involvement of the first and second defendant in the transactions and that the first defendant had entered caveats on the said lands.

[31] On 19 March 2014, Gerard Samuel & Associates representing the liquidator wrote to the second defendant to demand an explanation when it came to their knowledge that there was a purported transaction involving the said lands.

[32] The letter written by Gerard Samuel & Associates also made reference to the discovery by the liquidator that Berkshire was 'nothing but a shell company owned by one Shri @ Indran a/l Ramasamy and his brother Surain Dinesh Ram a/l Ramasamy that was only incorporated on 25 September 2013. The said Shri @ Indran Ram a/l has been holding himself out as an advocate and solicitor who practices at your firm although the records of the Bar Council show that he was struck off the rolls on 22 October 2010 by the Advocates & Solicitors' Disciplinary Board'. As the second defendant was acting for Berkshire and the first defendant was himself the director and shareholder of Berkshire, he could not have been ignorant of these allegations against him. Neither could he have been unaware of Nafilco's claim on the land. Therefore as early as March 2014, it can be reasonably inferred that the first defendant was aware of a dispute as to ownership of the said lands.

[33] The allegation raised in the police report by the private liquidator and letter of Gerard Samuel v Associates were later confirmed. On 28 March 2016, the civil suit brought by Nafilco vide 23NCVC-3– 03 of 2014, to set aside the transfer from Nafilco to Berkshire succeeded. The suit was brought against Berkshire and five others including the first defendant. The High Court declared that Nafilco was the lawful registered and beneficial owner of the said lands. The effect of the judgment was that the said lands had been fraudulently transferred from Nafilco to Berkshire, and the latter had no legal or equitable interest. The appeal by the defendants in that suit failed, as a result of which the issue of rightful owner has now been conclusively determined.

[34] Whilst the acts constituting fraud and fraudulent misrepresentation are to be examined at the time the first defendant was induced to enter into the agreement and to pay the earnest deposit, his subsequent conduct is also

relevant. The evidence on the first defendant's subsequent conduct only served to confirm his intention to deceive the plaintiff from the start of the negotiations.

[35] Following persistent enquiries by the plaintiff after discovering Nafilco to be the registered owner from a land search done, the first defendant wrote to the plaintiff solicitors, Messrs Ng, Ti & Associates on behalf of Berkshire on 19 December 2014. His letter, inter alia, stated as follows:

> The land was purchased from Nafilco (Insolvent) from a liquidator whom appointed V Manickam & Partners as their solicitors for sale of the property. The property was purchased by our company and accordingly the transfer had been effected by the land office on February 2014 ... However, due to some unresolved issues of a POD holder for the sum of RM17,000.00 and with the involvement of a private liquidator, the land had to be reissued back to Insolvency Malaysia for settlement of this matter which we did not have knowledge as the POD was only lodged on January 2014 this year when the company was wound up 29 years ago. We have identified the matter and paid the said sum into court for referring this matter as returned to 'Status Quo' which means the land will be reinstated back to our company ...

[36] The contents of the letter were totally untrue. The lands were clearly not purchased by Berkshire. They were fraudulently transferred to Berkshire. The Civil Suit 23NCVC-3–03 of 2014 suit filed by Nafilco to set aside the transfer on grounds of fraud was proof that the lands were not sold by Nafilco as claimed by Berkshire. The police reports by the liquidator and one of the directors of Nafilco evidenced this fact. In addition, the solicitors for the liquidator was Gerard Samuel & Associates, not V Manickam & Partners. There was also no payment into court by Berkshire.

[37] By 19 December 2014, the first defendant and Berkshire were already aware of Nafilco's suit to set aside the fraudulent transfer. Therefore the letter by the first defendant was intended to give the false assurance that the reinstatement of Berkshire's name on the title was merely a matter of course in due time. The contents were totally misleading.

[38] The first defendant then followed up with another letter on 29 January 2015 to Messrs Ng, Ti & Associates. The relevant part of the letter read as follows:

> ... We would like to inform that the matter is still in Court processes handled by our solicitors Messrs Govin T Durai & Co wherein we are informed that the subject matter will be heard sometime in mid February, 2015 for the re-vesting of the above said property back to Berkshire Hatherley Capital Sdn Bhd ...

[39] Again, the first defendant practised deception as there was no such proceedings for re-vesting of the said lands back to Berkshire.

[40] On 24 March 2015, the first defendant wrote a third letter to Messrs Ng, Ti & Associates which contents were:

> ... We would like to inform that the matter is currently under legalization wherein Messrs Govin T Durai currently representing us on the matter in Civil Court for taking over of the majority shareholding in the company known as Nafilco Sdn Bhd (wound up) of which Berkeley Hatherley Capital Sdn Bhd will be taking over full equity of Nafilco Sdn Bhd. The process involve reinstatement of Nafilco Sdn Bhd in the SSM, Declarative Order with local standi to set off the liability of Nafilco Sdn Bhd and usurping all rights of Nafilco Sdn Bhd by Berkshire Hatherley Capital Sdn Bhd ...

[41] There were no such court proceedings referred to in the letter. Neither was there any impending take over of Nafilco by Berkshire. In any event, there can be no question of any takeover in the light of the police reports and the pending litigation premised on fraud between Nafilco and Berkshire.

[42] Finally, the fourth letter of 6 May 2015 by the first defendant to the plaintiff's solicitors contained an outright lie when he said as follows:

> As for the legality of the property, the matter has been resolved and settled in court wherein we have succeeded in reinstating the property back to Berkshire and the registration of the Order has been done by our solicitors Messrs Govin T Durai & Company.

[43] The documentary evidence taken cumulatively tend to show that first defendant intended to act fraudulently from the inception of the transaction on the said lands, aided by the second defendant. They were clearly complicit in the entire matter. This was also evident from the correspondence between the second defendant and the solicitors for the plaintiff dated 26 May 2015 and 10 August 2015 which surreptitiously concealed the true state of affairs with regard to status of the said lands. The second defendant's letters made similar representations by giving false assurances that the lands would be eventually reregistered in Berkshire's name.

[44] To add to the suspicion of collusion, both the first defendant, Berkshire and the second defendant shared the same premises. This can be seen from the name cards of first and second defendant and the letter head of Berkshire.

[45] The surrounding circumstances in which the said lands were transacted and the subsequent conduct of the first defendant established that these were but a series of deception practised on the plaintiff from the time parties

engaged in negotiations for the sale of the said lands. The said lands were never Berkshire's to begin with, and to hold out Berkshire as the lawful registered proprietor constitutes both fraud and fraudulent misrepresentation.

[46] I find the sessions court to have correctly evaluated the evidence in finding that the 'documentary evidence and chronology of events clearly showed that the first defendant was at the material time aware of the legal ownership of the lands but had intentionally misled the plaintiff to purchase the lands and pay the earnest deposit', as this conclusion was borne out by the evidence adduced.

[47] The learned sessions court judge also found that the first defendant was not a credible witness. Having had the benefit of audio-visual evaluation of witnesses, I would be hesitant to differ from him as an appellate court does not have the advantage a trial judge has.

[48] I therefore find the learned sessions court's findings and conclusion of fraud and fraudulent misrepresentation to be justified from the evidence adduced.

RES JUDICATA

[49] I now come to the grounds in this appeal. The first defendant submitted that res judicata applied as summary judgment had been obtained against Berkshire in Suit 157, hence the liability for the plaintiff's loss had been determined. The plaintiff having subsequently withdrawn the suit against the first and second defendant, is now estopped from filing the instant case.

[50] The res judicata point raised is wholly misconceived and without merits. The principle would only apply if Suit 157 had determined the liability of the first defendant, but it did not, as the suit against him was withdrawn.

[51] The principle was succinctly explained in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 as follows:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has

the further elevated status of a question of public policy.

(see also *Newlake Development Sdn Bhd v Zenith Delight Sdn Bhd & Ors* [2019] 1 MLJU 694).

[52] Where the first defendant is concerned, there was no previous litigation to speak of Suit 157 was withdrawn against the first defendant.

LIFTING OF THE CORPORATE VEIL

[53] Counsel for the first defendant also argued that the learned sessions court judge erred in lifting the corporate veil in making the first defendant liable for the fraud of Berkshire. This was an attempt to enforce the judgment in the previous suit here. The finding of the sessions court judge caused prejudice and injustice to the first defendant argues as the lifting of corporate veil point was not the pleaded case of the plaintiff.

[54] I agree with submission for the defence that it was not the pleaded case for the plaintiff. The statement of claim was bereft of any pleading on lifting of the corporate veil. That being the case, the sessions court judge ought not to have decided on this issue as it goes contrary to the rule of pleadings, which purpose is to give notice to the opposing party as to the case it had to meet (see *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1).

[55] The pleaded cause of action against the first defendant was fraud and fraudulent misrepresentation. As discussed aforesaid, there was sufficient evidence to establish such a claim against him. There is no necessity to pierce the corporate veil to pin Berkshire's liability in Suit 157 on the first defendant.

[56] Lastly, the first defendant contends that he ought not to be made liable as he did not receive the money. It was the second defendant who held the money as stakeholder. The fact that the first defendant did not receive the money is irrelevant. It was his fraudulent act that induced the plaintiff to pay the earnest deposit. Loss was occasioned to the plaintiff when he could not recover the sum paid.

[57] Taking into account the totality of the evidence adduced, and the conclusion arrived at by the trial judge that fraud and fraudulent misrepresentation was established, I find no appealable error to warrant appellate interference on the issue of liability.

REMEDY

[58] In the proceedings below, the plaintiff sought for a refund of the RM200,000 paid as earnest deposit and damages.

[59] In *Kee Wah Soong v Yap Boon Hwa and another case* [2018] MLJU 1289 the Court of Appeal held:

> [85] We take note that the learned trial judge had made findings of fact that the second plaintiff had committed fraudulent misrepresentation on the defendant, but did not grant any damages in favour of the defendant, although it was specifically prayed as an alternative relief in the counter claim. Although we agree with the learned trial judge's findings on the fraudulent misrepresentation, the learned trial judge had erred in her refusal to grant damages for the same. Damages ought to be allowed after a finding of fraudulent misrepresentation on the part of the second plaintiff. Lord Denning MR in his judgment in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 WLR 673 at p 680 set out the relevant law governing the grant of damages for fraudulent misrepresentation:
>
> > In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered so far, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say:
> >
> > > I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well as suffered this or that extra damages.
> >
> > All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen.

[60] The plaintiff had clearly suffered a loss of RM200,000. He is entitled to be compensated for this loss. The sessions court was right to order this amount to be paid to the plaintiff as damages.

[61] In addition to the amount of RM200,000 the sessions court also awarded RM30,000 as damages. Although an award of damages was pleaded, there must be evidence to justify an award of general damages. In the absence of evidence to substantiate any other sum to be awarded apart from RM200,000, the award of RM30,000 is incorrect. The award of RM30,000 is thereby set aside.

CONCLUSION

[62] For the foregoing reasons, the appeal by the first defendant on liability is dismissed. However the appeal is allowed in part in that the award of RM30,000 damages is set aside. I also order that costs of this appeal of RM5,000 be paid by the first defendant to the plaintiff.

Order accordingly.

Reported by Nuzul Fitrie